IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 94 of 2004

with

CRIMINAL REVISION APPLICATION No 142 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHEIKH MADINABIBI MUSTAFABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 94 of 2004

MR JITENDRA MALKAN WITH MR. NOORBHAI SHAIKH, MR. SHIRAJBHAI MALIK, MR.RAKESH TRIPATHI AND MS. B.K. RAJPUT for Petitioner No. 1

MR AD OZA, PUBLIC PROSECUTOR for Respondent No. 1

MR SV RAJU for Respondent No. 2,35

MR BS PATEL for Respondent No. 3

MR YF MEHTA for Respondent No. 4-5,31-32

MR PR NANAVATI for Respondent No. 6,27-28

MR HARESH J TRIVEDI for Respondent No. 7,18-19,24

MR KH BAXI for Respondent No. 8

MR YATIN SONI for Respondent No. 9-11
MR KARTIK V PANDYA for Respondent No. 12
HL PATEL ADVOCATES for Respondent No. 13,29-30,36
MR PS CHAMPANERI for Respondent No. 14
NOTICE SERVED for Respondent No. 15
MR G RAMAKRISHNAN for Respondent No. 16-17
MR UA TRIVEDI for Respondent No. 20-22
MRS RANJAN B PATEL for Respondent No. 23
MS ASHA D TIWARI for Respondent No. 25
MS KIRAN D PANDEY for Respondent No. 26
MR RR MARSHALL for Respondent No. 33-34
MR BHARGAV N BHATT for Respondent No. 37-41

2. Criminal Revision Application No. 142 of 2004
SUO MOTU for Petitioner No. 1
MR AD OZA, PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 12/10/2004

CAV JUDGEMENT

1. The petitioner-original complainant has moved this Court by filing Cri.Rev. Application No.94/2004 invoking jurisdiction of this Court under Sec.397 R/w Sec.401 of The Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC), challenging the order passed by ld. Addl. Sessions Judge, Fast Track Court of District Panch Mahals at Godhara dated 20.1.2004 passed below application Exh.156 in Sessions Case No.160/2002 and Sessions Case No.59/2003. On perusal of certified copy of the application exh.156 submitted in the proceedings of above-referred two Sessions Cases, it emerges that by pointing out certain irregularities and infirmities, the complainant requested the Court to recall Seven witnesses examined by the prosecution invoking the powers vested with the Court under Sec.311 of CrPC. In the relief clause para-10 of the application exh.156, the complainant prayed for recalling of following seven witnesses and also simultaneously prayed that their depositions may be recorded in light of the contentions raised in the application. These witnesses are:-

(i) P.W.2 Chandubhai Shankarbhai
(ii) P.W.3 Rameshbhai Chandubhai Nayak
(iii) P.W.4 Nanabhai Kalubhai Harijan
(iv) P.W.7 Hunedbhai Junedi Dahodwala
(v) P.W.8 Babubhai Fulabhai.

(vi) P.W.12 Kantibhai Madabhai.
vii) P.W.13 Bharatbhai Budhabhai.

2(i) It is not a matter of dispute that the petitioner is the only complainant of the offence registered with Kalol Police Station of District Panch Mahals being CR No.I.41/2002 on 3rd March 2002. The complaint discloses various offences punishable under Indian Penal Code and also offence punishable under Sec.135 of the Bombay Police Act. After registration of offences punishable under sections 143, 147, 148, 149, 392, 397, 153(A), 201, 436, 120(B) of Indian Penal Code, the police also added one more offence punishable under Sec.376 of Indian Penal Code.

(ii) Initially, a group of accused was chargesheeted and the criminal case registered against them was committed to the Court of Sessions and the same was registered as Sessions Case No.160/2002. Thereafter, a supplementary chargesheet came to be filed against one another group of accused persons for the same crime and Sessions Case No.59/2003 is registered against other group committed on account of that chargesheet. Accused of both the Sessions Cases are facing consolidated trial for the charges levelled against them. It is told that the evidence is recorded as per the proceedings drawn in Sessions Case No.160/2002.

(iii) The prosecution has produced certain documents along with list exh.20 as provided under Sec.294 of CrPC. Many of these documents have been accepted in evidence without formal proof on admission as provided in the said Section. When the Court was proceeding with the trial, the petitioner found that material irregularities have been cropped up because of certain inactions on the part of either the Court and/or of ld. Special Public Prosecutor (ld. Spl. PP for short). In paras 5, 6, 7 and 8 of the application exh.156, the petitioner attempted to point out some of such irregularities and infirmities that may result into serious prejudice to the case of the prosecution and it was submitted before the trial Court placing reliance on the decisions namely (i) Koli Nana Bhana & Ors. v/s State of Gujarat, 1984 GLH 1055, (ii) Kharad Vallabhbhai Savaji & Ors. v/s State of Gujarat, 1995(2) GLR 1365, and (iii) Chandrasinh @ Chandubha Lalubha v/s State of Gujarat, 2002(2) GLR 960, that it is the duty of the trial Court to ensure that the attention of all the witnesses named in the application exh.156 is drawn to each fact stated by them in their respective police statements and if required, the witnesses should be appropriately contradicted or

confronted. Unless that contradictions or omissions are brought on record, they can not be legitimately proved which may result into serious prejudice to the prosecution and would not give a rise to the scope for the Court to condemn or critisize that particular witness, unless the attention of that particular witness is drawn to his previous statement or statements recorded by the police during the course of investigation, and so, before recording the evidence of any other witness, the witnesses named in the application may be recalled. At this stage, it is relevant to note that it was open for the ld. Presiding Judge to say that the witnesses named in the application or any of them may be recalled for the purpose or for a limited purpose even after recording of evidence of all the prosecution witnesses except Investigating Officer or the Police Officer who has recorded the statements of these witnesses named in the application or has drawn any panchanama during the course of investigation. Ld. Addl. Sessions Judge, after discussing the provisions of Sec. 311 of CrPC, rejected the application referring two decisions of the Apex Court; namely (i) State of Bihar v/s Lalu Prasad alias Lalu Prasad Yadav, AIR 2002 SC P.2432, and (ii) Rajendra Prasad v/s Narcotic Cell through its Officer-in-Charge, Delhi, AIR 1999 SC P.2292. The reasons assigned mainly by the ld. Judge are that (i) ld. Spl.PP was permitted to ask the questions which could be asked during the cross-examination only and (ii) some of the witnesses referred in the application have supported the case of the prosecution and, therefore, they are not cross-examined by the prosecution and (iii) the original complainant should not be permitted to rectify the mistake or to fill-up the gaps or lacuna in the evidence left by any of the witnesses mentioned in the application. It is held that there is no element of error which can be said to be bonafide error in putting questions to the witnesses. It is also observed that it is not necessary to pass formal order while recording depositions of the witnesses that a particular witness be treated as hostile and, therefore, ld. Spl.PP is permitted to cross-examine the witnesses.

(iv) It is important to note that ld. Spl.PP Mr. Gandhi has supported the case of the complainant and the Court was requested by ld. Spl.PP that the application of the original complainant may be allowed. However, the request extended by the ld. Spl.PP Mr. Gandhi was not acceptable to the Court.

3. The order rejecting application exh.156 is the

order under challenge. When Revision Application No.94/2004 was taken up for admission hearing on 1.3.2004, the Court found that there is some strength in the grievances raised by the petitioner. So, keeping the question as to the locus of the complainant open, the Court ordered to issue notice to the respondents and the same was made returnable on 8.3.2004. On perusal of the order under challenge as well as xerox copies of the depositions of Prosecution Witness Nos. 2, 3, 4, 7, 8, 12 & 13 tendered by Mr. Malkan, ld. counsel appearing for the petitioner, the Court initiated suo motu revision proceedings and directed the Registry to issue notice to the accused persons to show cause as to why reliefs prayed in the Revision Application filed by the original complainant and/or any other appropriate orders which are likely to go to the root of the conduction of the trial, should not be passed. Because of this order, second Revision Application i.e. Cri. Revision Application No.142/2004 came to be registered in exercise of the revisional powers. Meanwhile, further proceedings of the trial has been stayed. In the very order, the Court ordered to join ld. Spl.PP conducting the trial as party-respondent in Cri. Rev. Application No.94/2004 as well as Cri. Rev. Application No.142/2004 and ld. Spl.PP conducting the trial was asked to appear in person before the Court on the next date of hearing so that the Court can ask certain questions as to the role as Public Prosecutor in conducting the trial.

4. On 8.3.2004, the mater was again listed for hearing. Mr. Gandhi, ld. Spl.PP appearing in the trial Court in both the Sessions Case appeared in person before the Court with his ld. counsel Mr. J.B.Pardiwala. Ld. Sr.Counsel Mr. S.B.Vakil along with ld. counsel Mr. J.B. Pardiwala addressed the Court and ld. PP Mr. Oza appearing for the State of Gujarat addressed the Court and submitted that the State is supporting the cause of the complainant and Mr. Gandhi has also supported the complainant before the trial Court and had requested the Court to allow the application exh.156. So, there is no conflict of interest between the State and the complainant. On the contrary, the State has joined the cause of the complainant. So, by passing detailed order, the Court withdrew the notice issued against ld. Spl PP Mr. Gandhi appearing in the trial Court on 8.3.2004. I would like to quote relevant paras of the order passed by this Court on 8.3.2994:-

"5. Mr. S.B. Vakil has pointed out that Government of Gujarat vide Notification dated 28.11.2003 was pleased to terminate the services

of Mr. J.G. Pathak and Mr. B.J. Trivedi who were appointed as Special Public Prosecutors in the case. It is submitted that because of certain allegations the State Government has taken this decision. These Special Public Prosecutors were communicated about the decision on or about 4.12.2003. The petitioner- original complainant preferred her application under Section 311 CrPC on 3.12.2003 and on that day Mr. B.J.Trivedi being unaware of his termination vide Notification dated 28.11.2003, even had accepted the copy of the application as Special Public Prosecutor.

6. It is rightly submitted by Mr. Vakil that as the application was already preferred by the petitioner- original complainant, it was not necessary for learned PP Mr. Gandhi to file such or similar application and it was open for him to support the say of the complainant. Mr. Vakil has taken me through the relevant para 7 of the order under challenge wherein the learned trial Judge has specifically observed that the learned PP Mr. P.L. Gandhi had submitted that the witnesses mentioned in the application are required to be recalled. According to Mr. Gandhi, in the circumstances, the application under section 311 of CrPC was required to be granted. For short, he has supported the complainant. So, the notice of personal appearance has taken a wrong message that Mr. Gandhi has committed some mistake and the same needs to be rectified. Of course, he is in charge of prosecution but the date of his entry in the proceedings as PP needs to be considered and it is more relevant. The statement made by Mr. Gandhi supporting the original complainant can be considered when the revision application is taken up for hearing for passing appropriate final orders. The submission has great force.

7. xxx xxx xxx xxx xxx

8. It is not disputed even by Mr. Malkan that all witnesses named/referred to in the application dated 3.12.2003 have been examined by the prosecutor prior to 5.12.2003. According to Mr. Oza, the stand of the Government is clear which is reflected in para 7 of the order passed by the learned Trial Judge. So, without entering into the merits of this revision application at

this stage, with the above direction to the petitioner to serve notice to the accused persons (opponents) and accepting the submissions made by learned Senior Counsel Mr. Vakil, the notice served to Mr. Gandhi of this revision application is required to be revoked/discharged and it is at the same time observed that the order to issue notice to Mr. Gandhi was passed only with a view to see that, if any orders are passed in favour of the applicant, that can be implemented in true and correct spirit as on the relevant date of order passed, he was in charge of the trial as a PP. Accordingly, the order issuing notice to Mr. Gandhi is hereby revoked/ discharged and as a consequence of his, the name of Mr. P.L.Gandhi who is joined as opponent No.42, is ordered to be deleted."

5. Undisputedly, the respondents in both the Revision Applications are served.

6. On 8.4.2004, both the Cri. Revision Applications were listed for hearing, but at the request of ld. counsel Mr. SV Raju appearing for many of the respondent accused persons, hearing was adjourned to 15.4.2004. On 15.4.2004, considering the development in some other riot cases, a pointed query was raised to Mr. Malkan, ld. counsel appearing for the petitioner- complainant and it was clarified by Mr. Malkan that the present petitioner has not moved the Hon'ble Apex Court and is not at present thinking to move the Apex Court to get the trial transferred elsewhere than the Court of Sessions at Godhara, Dist: Panch Mahals. Mr. Malkan has of course orally clarified that the petitioner is not contemplating to move any other petition for transfer of Sessions Case from District Panch Mahals to any other district in the State or to change ld.Spl.PP Mr. Gandhi who has been entrusted the trial by the State. The Court ordered the Registry to see that R & P of Sessions Case No.160/2002 is brought before the Court especially in view of Suo motu revisional proceedings initiated by the Court. R & P are called for and they are before the Court.

7. I have heard ld. counsel Mr. Malkan appearing for the petitioner, ld. PP Mr. Oza for the State supporting the case of the petitioner. I have also heard ld. counsel Mr. S.V. Raju, Mr. Y.F.Mehta and Mr. Bhargava Bhatt appearing for the respondents accused at length. Meanwhile, ld. counsel appearing for the respondents have adopted the arguments advanced by ld. counsel Mr. SV Raju. The anxiety of ld. counsel

appearing for the respondents expressed before the Court is that this Court should hear and record the finding on the preliminary points which are raised before the Court. However, for the sake of convenience, I have heard ld. counsel appearing for the parties on merits on all the points.

8. Preliminary objections raised by the ld. counsel appearing for the respondents are:-

(i) That the petitioner- original complainant has no locus to file the present Revision Application especially when the case is instituted on police report submitted under Sec.173(2) of CrPC;

(ii) That Revision Application is not maintainable on account of the statutory bar provided under sub-section (2) of Sec.397 of CrPC;

(iii) This Court after passing the order on 1.3.2004, should not proceed further with the matter as the suo motu directions contemplated in the order are very wide, non-specific and beyond the scope of business allocated upon the Court as per the current Roster and suo motu proceedings along with revision application may be placed for hearing before the Bench taking up petitions moved under Sec.482 of CrPC or taking up Special Criminal Applications moved under Article 227 of the Constitution of India. Considering the gravity of the offence, nature of charge levelled against the respondents accused, this Court should not pass the order casually allowing Revision Application because there is no need to interfere with the discretionary order, otherwise, it would be improper exercise of jurisdiction when the jurisdiction of this Court is limited.

9(i) Challenging the locus, it is argued that this Court considering the provisions of Sec.301(2) of CrPC should dismiss the Revision Application because the petitioner-original complainant has even no right to file an application under Sec.311 of CrPC requesting the trial Court to recall the witnesses. When the State has taken the cause of the complainant and all victims of the crime and ld. PP or APP in charge of the case is appearing and pleading the case before the trial Court, then the original complainant has no statutory right to address the Court unless statutorily provided. The prosecution when is in the hands of the State, only ld. PP or ld. APP appearing in the matter is supposed to conduct the prosecution and their advocate or pleader appointed by

the original complainant at the most can instruct the ld. PP or ld. APP and if permitted by the Court, the complainant or the pleader appearing for the complainant can submit written arguments after the evidence is closed in the case. Prior to that stage, the complainant or the pleader appearing for the complainant has no role to play in conduction of the trial. Merely because Mr. Gandhi, ld. APP appearing for the prosecution has supported the case of complainant verbally, it can not be said that the application to recall the witnesses was filed by him or was at the instance of the prosecuting State. The application was not even submitted through the ld. PP appearing in the matter nor it was submitted even by Mr. Gandhi that application may be treated as an application filed on behalf of the State. So, for all purposes, an application to recall witnesses was by the present petitioner Madinabibi and ld. Judge could have rejected the application solely on this ground without entering into the merits of other legal and special issues raised before the Court. Mr. Bhargav Bhatt, ld. counsel appearing for one of the respondents accused at one point of time during the course of oral submissions had insisted that point of locus standi should be decided first and till the verdict on the issue of locus standi is recorded by the Court, Revision Application on other points even may not be heard. To avoid piecemeal hearing, ld. counsel appearing for the parties are heard on all points, but in view of the nature of submissions made by ld. Counsel Mr. SV Raju and Mr. Bhargava Bhatt, it would be proper to answer the point of locus standi raised by the respondents original accused first. In the decision reported in the case of Ashwinbhai Shambhu Prasad v/s National Rayon Corporation, reported in 24(1) GLR 522, the Court has observed that as soon as the case is committed to the Court of Sessions as provided under Sec.225 of CrPC, ld. PP would be in charge of the case and the only right which a private complainant or his Advocate would be to sit by the side and assist the ld. PP at the best as provided under Sec.301(2) of CrPC. The objects and reasons incorporated in Clause 231 to 243 of CrPC (Sec.225 to 237 CrPC) make this further clear and any proceedings commencing after the committal by the Magistrate and its further progress from that stage before the Court of Sessions, it is only the ld. PP who is to be in charge of the conduction of the proceedings and the private complainant can not have any right to participate and only limited exception thereto is carved out in Sec.301(2) of CrPC. In the case of Ashwinbhai (supra), the case was initially instituted on a private complaint. In the present case, the case is instituted on a police report. So, the petitioner

Madinabibi has no locus to submit an application to recall the witnesses under Sec.311 of CrPC. Referring to 2 different decisions of Andhra Pradesh High Court, this Court, in the case of Patel Varyabhai Jesangdas v. State of Gujarat and Another, reported in 1986(1) GLR 538, has held that:-

> "in a large majority of cases, the words "shall act" occurring in sec.301(2) have been construed as not including the power to plead or to examine witnesses and cross-examine the witnesses. As observed above, the language of sub-sec.(2) of sec.301 favours interpretation distinguishing the connotation of the word "act" and the word "to plead" and when the the Division Bench of our own High Court has taken a similar view, it shall have to be held that the order passed by the learned Judicial Magistrate, First Class, Vijapur does not suffer from any infirmity or illegality which requires to be corrected in the exercise of the revisional jurisdiction of this Court."

(ii) In this cited decision, ld. JMFC, Vijapur had rejected the complainant's request that his private advocate Mr. NM Shah be permitted to conduct the case on behalf of the prosecution. According to ld. counsel Mr. Raju, in the present case, the original complainant by filing an application under Sec.311 of CrPC had made attempts to take the prosecution in her hands in the midst of the trial by filing of an application to recall witnesses directly and the rejection of the said application, therefore, may not be interfered with. The another decision relied upon and placed before this Court is the decision of the Kerala High Court in the case of Somasundaram v/s P.Chandra Bose and another, reported in 2001 Cri.LJ P.4370. In para-4 of the said decision, after quoting Sec.301 of CrPC, Kerala High Court has observed that :-

> "As is clear from the above while sub-section (1) stipulates that the Public Prosecutor or Assistant Public Prosecutor is competent to appear and plead without any written authority, what sub-section (2) enables is assistance to the Assistant Public Prosecutor by another counsel of the party's choice. However, as clear from the Section itself, what is important in this regard is the grant of permission by the Court. Even if the permission is granted, the role of the said counsel allowed to assist the Assistant Public Prosecutor is very much limited. The rein is

still held by the Public Prosecutor. If the court so permits, the assisting counsel can submit written arguments after the evidence is closed in the case. That is all. The Section does not envisage any other authority or independent power for the counsel who is engaged to assist the Assistant Public Prosecutor. In other words, even after permission is granted for rendering assistance under S.301(2) of the Cr.P.C. the responsibility for conduct of the prosecution continues to be with the Assistant Public Prosecutor. It naturally follows that he is the person who is to decide how the prosecution should proceed and whether recall of any witness under S.311 is necessary. According to me, the right to file an application under Section 311 in a case where the Court grants permission under S.301(1) of the Cr.P.C. is available only to the Assistant Public Prosecutor and not to the counsel who is allowed to assist the Assistant Public Prosecutor."

Kerala High Court, in the above-cited decision, in light of the facts, has held that the right to file an application under Sec.311 of CrPC in a case where the Court grants permission under sub-section (1) of section 301 of CrPC is available only to ld.APP and not to ld. counsel who is allowed to assist the ld. APP i.e. Advocate appearing for the complainant. In response to the query raised by the Court, ld. counsel appearing for the parties have fairly accepted that there is no direct decision of this Court on such or similar facts. However, it is submitted that the ratio of the decision in the case of Manharlal I.Shah v/s Yogeshkumar Kanaiyalal Saraiya & Ors., 1987(1) GLR 608 would help the respondents accused wherein this Court by referring the decision in the case of A.R.Antulay v/s R.S.Nayak, AIR 1984 SC P.718, has observed that any one can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provision. In the cited decision the Division Bench of this Court has held that;-

"on true interpretation of Sec.301(2), a lawyer instructed by private person to assist the Public

Prosecutor has no right of audience except to the extent permitted by that section.: The Advocate permitted to assist the ld.PP if feels that the trial is not conducted fairly, it will be open to him to draw attention of the Court in that behalf. If the Court feels that some assistance is necessary on a point arising before it, it may appoint such lawyer or any other lawyer as amicus curiae. Subject to that the lawyer instructed by a private person to assist the Public Prosecutor has no right to audience in a trial before the Sessions Court."

It is vehemently submitted that ld. Sessions Judge could have rejected the application saying that the complainant has no right to audience and, therefore, the application submitted under Sec.311 of CrPC is not entertainable.

(iii) One of the main arguments advanced against the petitioner is that she has no locus.

Rajasthan High Court in the case of Tarachand & Others v/s State of Rajasthan, 1997 Cri.LJ P.2637, after referring the decision of the Apex Court in the case of Thakur Ram (AIR 1966 SC 911), has held that a revision of a case instituted on police report, would not be maintainable at the instance of a private party except when the case falls within the expression of "barring case" (emphasis supplied for the purpose). The say of the original complainant is consistent that there are glaring defects in the procedure and there is manifest error on the point of law and consequently there has been fragrant miscarriage of justice, then the ld. trial Judge ought to have considered the aspect whether the case falls within the expression of "barring case". Of course, the Apex Court in the case of K.Chinna Swami Reddy v/s State of Andhra Pradesh, AIR 1962 SC 1788, was dealing with the point as to whether it is open to the High Court in revision to set aside the order of acquittal even at the instance of a private party though the State may not have thought it fit to appeal, but the observations of the Apex Court in the decision in the case of K.Chinna Swami Reddy (supra) being relevant, have to be considered and I would like to reproduce the relevant para-7 of the decision for convenience

"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought

fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section l(4) of S.439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial when it can not itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be; where the trial Court has no jurisdiction to try the case but has still acquitted the accused, or where the trial Court has wrongly shut out evidence which the prosecution wished to produce or where the appeal court has wrongly held evidence which was admitted by the trial Court to be inadmissible, or where material evidence has been overlooked either by the trial Court or by the appeal Court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be case of exceptional nature, where the High Court can justifiably interfere with an order of acquittal' and in such a case it is obvious that it can not be said that the High Court was doing indirectly, what it could not do directly in view of the provisions of S.439(4). We have therefore to see whether the order of the High Court setting aside the order of acquittal in this case can be upheld on these principles."

10. The facts of the present case are substantially different. The application to recall witnesses under Sec.311 of CrPC is not signed by the ld. Spl.PP nor the same was submitted through ld. Spl.PP, but on the date

of hearing of the application, the State has supported the case of the complainant. Mr. Gandhi, ld. Spl.PP appointed by the State of Gujarat replacing the earlier Spl.PP to conduct the trial, has took up the cause of the complainant. Of course, it is not mentioned in the order under challenge, but it is apparent from the nature of submissions advanced by Mr. Gandhi, ld. Spl.PP that prosecuting State has accepted the grievance raised by the complainant in the application and requested the Court to allow the application as prayed. This submission made by ld.Spl.PP Mr.Gandhi can be said to be a request from the Prosecuting State and not a request only on behalf of the petitioner -original complainant. There is no element of conflict and no contrary submissions were mainly advanced by ld. Spl.PP. The entire scheme emerging from all relevant provisions for conduction of a fair trial indicates that locus standi of the complainant is a concept foreign to the criminal jurisprudence of the country save and except where Statute provides for eligibility of the complainant. It is apparent that one another purpose is to see that the trial is conducted in a regulated manner otherwise the lawyer appearing for the complainant and/or other victims may seriously prejudice the cause of the State. The ratio of the decision of the Kerala High Court in the case of Somasundaram (supra) or the observations made by this Court in the above-referred decision, would not help the respondents accused. On the contrary, ld. PP Mr. Oza has supported the case of the petitioner and it is argued by ld. PP Mr. Oza that ld. trial Court would have considered the request as if it is advanced by ld. PP appearing in the matter relying on the same grounds mentioned in the application. Who applies, according to me, is not a matter of much relevance, but who supports the application is important. Necessity is that State remains in charge of the prosecution and the fairness which requires to be maintained in conducting the trial is taken care of by the ld. Presiding Judge. It is not necessary that the State must file such or similar application or it could have filed another similar application for the purpose. Support from the PP in such facts situation is relevant and important. It is not even the submission that the complainant had attempted to override ld.PP and from the facts emerging from record, it is difficult to infer even impliedly that the wish of the complainant was to become a prosecutor parallel to the State. The application preferred by the original complainant has force of an application by the State as ld. Spp.PP Mr. Gandhi has requested to grant the said application accepting the grievance expressed in the application itself. Merely because the State could have

requested to recall any number of witnesses at any subsequent stage of trial or ld. Presiding Judge of the Court suo motu could have called any of the witnesses mentioned in the application, would not make the case of the present petitioner weak on the point of locus. In view of the observations made by the Apex Court in the case of Abhilasha & Ors. v/s State of Rajasthan & Ors., 2000(1) SCC 237, it is rightly submitted by ld. counsel Mr. Malkan for the petitioner that when the ld. PP is sure that in the event certain material which is brought to the notice of the ld. PP is able to unveil the truth, the ld.PP can certainly take that into consideration and act according to law. In the present case, placing certain contentions and facts in the application preferred under Sec.311 of CrPC, the complainant had made an attempt to assist the ld. Spl.PP and on the date of hearing, ld. Spl.PP Mr.Gandhi, considering the details of the application had made submissions in accordance with law. So, the application preferred by the original complainant could not have been otherwise rejected on the point of locus. In the same way, the present Revision Application also can not be thrown solely on this ground. At one point of time, ld. PP Mr. A.D.Oza has submitted that the State may also file Revision Application against the order under challenge. Of course, the State of Gujarat has not initiated any revisional proceedings against the impugned order, but the stand taken by the State of Gujarat in the present Revision Application would help the present petitioner complainant as State of Gujarat is supporting. At this stage, it is necessary to mention that ld. Spl.PP appointed to conduct the trial of Sessions Case No. 160/2002 and 59/2003 was instructed not to appear and conduct the trial as mentioned herein above.

11. It is true that in a case instituted on a police report, a victim and/or original complainant have no substantive right to address the Court or to participate in the proceedings as prosecutor, but it has been held by the Apex Court in the case of Thakur Ram v/s State of Bihar, reported in AIR 1966 SC 911, that a private party can prefer an application seeking appropriate relief and such application can sustain if the private party is able to satisfy the Court that it is necessary to prevent substance and miscarriage of justice. The Apex Court, of course the facts are different, has observed that:-

" in a case which has proceeded on a police report, a private party has really no locus standi. No doubt, the terms of S.435 under which the jurisdiction of the learned Sessions Judge

was invoked are very wide and he could even have taken up the matter suo motu. It would, however, not be irrelevant to bear in mind the fact that the Court's jurisdiction was invoked by a private party. The criminal law is not to be used as an instrument of wrecking private vengeance by an aggrieved party against the person who according to that party, had caused injury to it. Barring few exceptions, in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book."

12. The ratio of the Kerala High Court in the case of Somasundaram v/s P.Chandra Bose and another, 2001 Cr.LJ P.4370, otherwise has only a persuasive value. This decision in light of the ratio and locus accepted by the Apex Court propounded in the decision in the case of Thakur Ram (supra), shall have no application in light of the facts of the case on hand. Division Bench of this Court, in the case of Manharlal I.Shah v/s Yogeshkumar Kanaiyalal Saraia & Ors., 1987(1) GLR 608 (28(1) GLR 601), ofcourse has observed that sections 225 and 301(2) of CrPC must be read so as to have a harmony and avoid inconsistency. Here in the case on hand, ld. Spl.PP in charge of the sessions case, has taken the cause of justice and supported the complainant.For short, the Court is not inclined to accept the technical resistance placed by the respondent accused that the present application needs to be dismissed on the point of locus and the submission that this Court should not exercise revisional jurisdiction on an application made by a private party, is also not found acceptable.

13. Another preliminary objection raised before the Court is that revision application is not maintainable on account of the Bar provided in sub-sec.(2) of Sec.397 of CrPC because the powers of revision conferred by sub-sec.(1) of Sec.397 can be exercised only when the order is not an interlocutory order and, therefore, it is submitted that the revisional powers shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or in any petition. In support of the submission, reliance is placed on the dictionary meaning given in The Law Lexicon by P. Ramanatha Aiyar (1997 Edition) and it is submitted that interlocutory order is not necessarily confined to an order made between writ and final judgment, but it means

an order other than a final order or judgment. (See: Smith v. Cowell, 6 QBD 75). In the case of VC Shukla v/s State through CBI, AIR 1980 SC 962, the Apex Court has observed that;

> "An interlocutory order has to be construed in contradiction to or in contrast with Final Order. It means not a final order, but an intermediate order. It is made between the commencement of an action and the entry of the judgment.

14. However, it is important for the purpose of the present judgment to note that this Court, while dealing with the case of Rajesh Chandubhai & Ors. v/s State of Gujarat, 2001(3) GLR 1979, has held that the order under Sec.311 of the Code is not an interlocutory order and revision is maintainable against the order rejecting the application of defence to recall the prosecution witnesses for cross-examination. The Court was dealing with Rev. Application filed by the original accused challenging the order passed by ld. Single Judge whereby the request to recall the prosecution witness examined earlier was rejected. It is important to note that sec.311 is an independent provision as some other provisions in Chapter 24 captioned " General Provisions as to Inquiry & Trial". However, the logic placed before the Court by the Court that the grievance can be made before the appellate Court after final conclusion of the trial by the aggrieved party and if the appellate Court finds that during the process the trial Court has committed a grave error and the same has resulted into prejudice to either party, the appellate Court can correct that error at that particular stage. Decision in the case of VC Shukla (supra) should be read in correct perspective and till date, the Apex Court has not categorically propounded that each interim order passed after initiation of the criminal proceedings and between the institution of prosecution and its final conclusion, should be termed as an interlocutory order. On the contrary, in en-number of decisions, the ratio propounded is that though every interlocutory order is an interim order, each interim order may not be the interlocutory order. If the dictionary meaning placed by the accused in reference to phrase "interlocutory order" is read, then any order passed below application making/expressing grievance in reference to Sec.316 or 319 of CrPC also can not be challenged by the party who is aggrieved by the order passed by the Presiding Judge conducting trial, because sec.316 provides that no influence to be used to induce disclosure. Sec.319 empowers the Court to proceed against other persons appearing to be guilty of the

offence. Certain orders shall have to be passed by the trial Court during the proceedings because the ultimate goal of the trial Court is (i) to do justice, and (ii) to prevent injustice. Ratio of the decision in the case of VM Abdul Raheman and Others v/s D.K.Cassim & Sons and another, AIR 1933 PC 58 is found not relevant where the Privy Council has said about the "test of finality" while dealing with a case in reference to Sec.109(a) & O.41 R.23 of CPC (Old). On the contrary, the discussion as to concept of "final order" would help the present petitioner to some extent. Of course, High Court of Jammu & Kashmir in the decision in the case of S.K. Mahajan and etc. v/s Municipality, Jammu & others etc., 1982 CrLJ 646, has said that the order refusing to summon a witness under Sec.540 is an interlocutory order against which no revision would lie. But this Court as discussed earlier, has observed otherwise while dealing with similar objection that was raised in the case of Rajesh Chandulal (supra).

15. Rajasthan High Court in the case of Umed Singh & Ors.v/s Devi Singh & Ors., 1985(1) Crimes 121, has observed that the order under Sec.311 is an interlocutory order and revision application against such may not lie. However, at the same time, Rajasthan High Court also observed that "but it does appear to me that this is a fit case where powers under Sec.482 of CrPC must be invoked." It is not necessary to invoke extraordinary powers of this Court because the revisional court exercising supervisory jurisdiction can positively correct the order which has an element of finality and has resultant effect on entire subsequent proceedings, if the same is found erroneous.

16. Himachal Pradesh High Court in the case of Dwarkadas v/s State of HP, 1980 CrLJ 1018, has held that the order rejecting the application for recalling of a witness is an interlocutory order and not revisable under Sec.397 of CrPC, but it is simultaneously observed that the order could be set aside under Article 227 of the Constitution of India. In para-13 of the judgment, the Himachal Pradesh High Court has observed that such an order is an interlocutory order. In para-14 of the said judgment, it is observed that " it is also very doubtful whether provisions of Sec.482 of CrPC can be made applicable in the instant case or not." Therefore, in para-15 of the said decision, it is observed that "powers vested with the Court under Art.227 of the Constitution of India should be exercised." For short, this Court has ultimately attempted to see that if during the proceedings an element of injustice emerges or with a

view to do justice, the correct scenario atleast should be brought on record, then the courts are not powerless and appropriate decision requires to be taken.

17. In the case of Amar Nath and Others v/s State of Haryana and others, AIR 1977 SC 2185, as pointed out by ld. counsel Mr. YF Mehta appearing for some of the accused persons, that the powers vested with the Court under Sec.482 of CrPC are inherent powers and does not confer any new powers and a harmonious construction of Ss. 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under S.397(2) and can not be the subject of revision by the High Court, then to such a case the provisions of Section 482 would not apply. Where there is an express provision, barring a particular remedy, the Court can not resort to the exercise of inherent powers. This decision is placed before the Court on the pretext that the order passed under Sec.311 is an interlocutory order. The Court is aware that non-obstante clause expressly exclude the provisions of Code of Criminal Procedure and the Court can not call into aid the provisions of Sec.482, but the fact that the order has been passed at an interim stage is not a sole test to decide whether it is interlocutory order or not. So, in the cases where it is pointed out that subordinate Court has either failed in exercising the jurisdiction or has refused to exercise the jurisdiction, then in that eventuality, such an act or error can be corrected by the revisional court.

18. The order of the trial Court exhibiting a document or not exhibiting a document tendered in evidence has been held as an interlocutory order by this Court in the decision in the case of State of Gujarat v/s Gaurang Mathurbhai Leuva & Ors, 1999(3) GLR 2325. However, in the case of K.K.Patel & Anr. v/s State of Gujarat & Anr. 2000(4) GLR 3599, the Apex Court in para-12 of the decision has observed that;-

> "The view of the ld. Single Judge of the High Court that no revision was maintainable on account of the bar contained in Sec.397(2) of the Code, is clearly erroneous. It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Sec.397(2) of the Code, the sole test is not whether such order was passed during the interim stage. The feasible test is whether by upholding the objections raised by a party, would it result in culminating the proceedings, if so any order passed on such objections would not be merely

interlocutory in nature as envisaged in Sec.397(2) of the Code."

It is true that in the present case, rejection of the application under Sec.311 preferred by the present petitioner would not have culminated the proceedings, but it is relevant to refer the decision in the case of Rajendra Prasad v/s Narcotic Cell through its Officer-in-Charge, Delhi, AIR 1999 SC 2292 where the appellant accused had approached the Apex Court challenging the order passed by the Delhi High Court. Delhi High Court rejected a Revision Application of the appellant accused saying that there are certain circumstances which are mentioned in the order by the ld. Sessions Judge, which forced him to pass the order. The grievance of the accused was that the prosecution is attempting to fill up the lacuna and Delhi High Court entertaining Revision Application on merits rejected the contention of the accused. The Apex Court making certain observations in para-8 of the decision, rejected the Appeal by Special Leave and appreciated the evidence as well as the ratio of the decision in the case of Mohanlal Shamji Soni v/s Union of India, AIR 1991 SC 1346. Though there was a scope, the Apex Court has not observed/said that the revision of the present appellant was otherwise bad in law and not maintainable in view of the bar of sub-sec.(2) of Sec.397 of the Code. This Court is not in agreement with the submission made that the orders passed are able to culminate the proceedings only, can be entertained by the revisional Court. In the case of Cheeku Singh v/s State of Rajasthan, 1998(1) Crimes 622 (Raj), the Rajasthan High Court had entertained the revision application against the order passed below application preferred under Sec.311 of CrPC to issue witness summons to the witnesses not mentioned in the list of witnesses after the statement of the accused was recorded under Sec.313 of CrPC and Raj.High Court held that "if the proceedings are permitted to be re-opened, the very object of taking Sessions trial in Sessions would be defeated." For short, revision application was not rejected on the ground of bar of Sec.397(2) of CrPC. In the same way, in the decision of the Orissa High Court in the case of GH Aiyer v/s State, 1998 CrLJ 1821 (Orissa) has observed that "examination and re-examination of a witness if considered in the background of the provisions of Sec.138 of the Evidence Act, the provisions of Sec.311 are supplementary and not ....." For short, the Orissa High Court has also refused to exercise revisional jurisdiction though it was brought against the order passed while dealing with an application under Sec.311. Certain provisions in

Chapter-24 are independent and supplementary provisions and the orders passed while dealing with a prayer made under such particular section, would positively determine an important issue and such an order though has an element of intermediate or interim order, it would not be legal to say that it is an interlocutory order within the meaning of Sec.397(2) of CrPC.

19. To visualise a thin golden thread in the submissions made by the present petitioner, one example would help the Court. Suppose a person approaches the Court independently pointing out that he is material and relevant witness and he is able to throw light when the Court has undertaken the exercise to find out the truth and if Presiding Judge rejects such an application after hearing such a person/witness or ld. counsel appearing for him, whether he can approach the revisional court making grievance that this is nothing but a failure in exercise of jurisdiction vested with the Court, in light of the facts that are required to be brought before the trial Court which he intends to bring to the notice of the Court during the hearing of the application filed by such a person ? In the same way, when the accused is facing a trial of the offences punishable under the various provisions of IPC and some of such offences are compoundable, and if the accused or complainant or victim approaches the trial Court before the statement of the accused under Sec.313 is recorded or any time prior to pronouncement of judgment, that he has compounded offence that are made compoundable under Sec.320 CrPC for which no formal permission of the Court under the Code is required, stating that the accused is ready to face charges of the offences that are not otherwise compoundable, the order of rejection of such an application or request praying acquittal qua the compoundable offence challenged, whether should be entertained by the revisional court on the ground of failure in exercise of jurisdiction, in revision ? These are the questions which are required to be looked into when dictionary meaning of the word "interlocutory" is placed before this Court praying rejection of revision application on account of statutory bar provided under Sec.397(2) of CrPC. For short, this Court do not find any merits in this submission otherwise as this Bench is not of the view contrary to the view taken by the another Bench of this Court (Coram: K.M. Mehta,J) in the case of Rajesh Chandulal (supra), then that decision has a binding force. So, this Bench reiterates the ratio in the earlier decision in the case of Rajesh Chandulal (supra).

20(i) While dealing with the application u/s 311 CrPC being preferred by either party, prosecution or defence, or in case where the Court suo motu intends to examine a person witness whether examined earlier during trial or not, thinks that witnesses may be called or recalled, (then in any of such contingency), the determining factor would be whether it is essential to reach to a just decision and can help the Court in reaching to correct inference or finding. The Court when so feels that a witness is required to be examined may be at the instance of either party or by the Court suo motu, then in that case, the Court can ably order that such witness either be called or recalled for examination/ further examination. Such examination must be, therefore, necessary from the Court's point of view. Such satisfaction can be recorded at any appropriate stage of the trial. So, the arguments advanced that the decision of ld. trial Judge of grant of application preferred by the complainant and supported by the PP, is the decision that could be branded as premature, is not found acceptable. Merely because the witness named in the application or any of them could have been called by the trial Court after conclusion of evidence of prosecution side, though is a legal submission, would not have any adverse effect on the strength of the case of the present petitioner. A party may not wait till wisdom emerge and can point out the need. If any party including the original complainant feels that a particular witness is required to be called, (i) though not named in the chargesheet, (ii) if named,but decision to drop that witness has been conveyed to the Court, or (iii) any witness examined earlier be recalled then it may make a legitimate request to the Court to examine that witness as Court's witness and such a party may not wait till the conclusion of evidence. Efforts may not be recent, but search to truth is a legal obligation that requires to be discharged with utmost care and diligence. Mainly such or similar application is nothing but an attempt to focus on the aspect which needs to be highlighted before the Court conducting the trial. The cases where the Court is of the view that a witness requires to be recalled or re-examined, can help the Court in fact finding mission and/or may prevent at least miscarriage of justice, then such an application normally should be decided favourably. While considering this aspect, approach of the trial Court should not be very technical because a party resisting such request normally is tempted to place one of the standard legal submissions that a party praying for such examination by calling or recalling of witness is nothing but an exercise to patch-up the lacuna that is left in the trial. In exercise of search for

truth, or to trace out the correct facts, lacuna if any left out is patched up, then such patching should be viewed incidental. The apprehension that a party that has approached the Court by making an application under Sec.311 of CrPC will be able to patch up the lacuna, if expressed, should not be given weightage then required and the finding on such an application must be judicial one.

(ii) In the present case, an application was moved to recall the witnesses who are already examined and there is no reason why the prosecution should wait till it is decided by the Court itself whether it would recall any of these witnesses at the conclusion of the prosecution evidence. On the contrary, in certain situation, the exercise of such recalling of a witness examined earlier if is really required, then it should be undertaken at the earliest so that any party and especially the defence side can avoid prejudice or other resultant effect when it has to cross-examine a new witness or witnesses that may be called by the Court suo motu. For taking objective decision in such a situation, various tests can be applied and one of such test should be that what would be the effect if such a witness is not examined at all or if he is not recalled. Sequence of thought must be in reference to material on record and its relevance. A witness may not be recalled so that certain general questions can be asked or evidence collected by such examination can become a matter/material of other utility. Whether such an attempt is really an afterthought is also a question which has to be answered by the Court while appreciating the rival contentions. It is rightly argued by ld. PP Mr. Oza that as such ld. trial Judge has failed in appreciating the contentions raised by ld. PP Mr. Gandhi, otherwise, ld. PP Mr. Gandhi would not have supported the complainant. At this juncture, when this Court is of the view that (i) there is no detailed cross-examination as such by the then Spl.PP and some witnesses have availed improper opportunity of keeping mum on vital aspects and their earlier statements, or (ii) the conduct of certain witnesses is found to have remained unexplained and (iii) when it was possible to use the previous police statement of that very witness and that has not been done effectively, that may result into or create a hurdle in finding out the real fact, then the Court must exercise jurisdictional discretion in favour of a party who has approached the Court for the purpose. In the case of Pradeep Kumar Agarwal v/s State, 1995(1) Crimes 390, Orissa High Court has observed as under:-

" The object underlying section 311, Cr.P.C. is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Courts to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is general section which applies to all proceedings, enquiries and trials under the Cr.PC and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. Sec.239, 165 and 311, Cr.P.C. co-exist supplementing one another. In section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code." It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

21. The ratio of the decision of Calcutta High Court reported in 1996 Cri.LJ P.813 (Shudhir Das v/s State of West Bengal) and a case reported in 1997 Cri.LJ 152 (R.Krishna Murthy v/s State), fully help the petitioner and in turn the State.

22. The impression created in the mind of the Court is that the then ld. Spl.PP has not made any attempts to cross-examine some police personnels, even without declaring them hostile, there was a scope to ask certain questions by confronting them with permission of Court with their earlier statements recorded by the Investigating Officer and thereafter if required, formal permission to treat them hostile to the prosecution could have been obtained. The witness if is not cross-examined at length or is not given an opportunity to explain the conflict emerged because of omissions or contradictions between his version before the Court and earlier version before the Investigating Officer, then it would not either be legal or proper for the prosecutor to argue before the trial Court to condemn the concerned witness and in the same way, the trial court, I am afraid, would

be able to comment upon the credibility of such witness. So, justification emerging from the application filed by the complainant and the necessity brought to the notice of the ld. trial Judge has not been appreciated while disposing of the application in question. This is nothing, but failure of exercise of discretionary jurisdiction. This takes this case into the area of "barring cases".

23. The observations made by the Apex Court in the case of Zahira Habibulla H.Sheikh & Another v/s State of Gujarat & Others, (2004) 4 SCC 158 (popularly known as Best Bakery case), while reversing the acquittal confirmed by this Court are found relevant and the Court would like to quote the some such observations where the Apex Court has said:-

"34. As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane,J. put it:

" It is desirable that the requirement of fairness be separately identified since it transcends the content of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

35. This Court has often emphasised that in a criminal case the fate of the proceedings can not always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and the prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice -- often referred

to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant material necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice can not turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

43. The Courts have to take participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a

manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. he court can not afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In Mohanlal v. Union of India this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as "any court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to

> arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth."

24. The observations made in paras 34, 35, 39,40, 43 & 44 as above are absolutely relevant qua the facts and circumstances emerging in the case on hand. On the contrary, in the case of Zahira Sheikh (supra), the State Government was directed to appoint another PP noticing some unusual factor and further observed that "though witnesses normally do not have any say in the matter of appointment of PP, such liberty to the complainant party if accorded, would be proper. On the other hand, in the case before this Court, probably on receipt of certain information, the State Government itself decided to substitute the ld.PP and as observed earlier, even the present petitioner has nothing to say against the transparency and competence of ld PP Mr. Gandhi and obviously the complainant is at liberty to assist the ld. PP during the trial. When this ld. PP substituted by the State Government by a special order has clearly taken up the cause of the petitioner before the trial Court and ld. PP Mr. Oza appearing for the State has supported the say of the present petitioner, the ld. trial Court had no reason to deny the request made vide application exh. 156. If the lapse or omission is committed by the Investigating Agency or because of the negligence of other agency, then prosecution evidence is required to be examined 'de hors' such omission or negligence to find out whether the evidence can be said to be the evidence efficiently led or tendered before the Court or not. This was a crucial question before the trial Court. In such a situation, the Apex Court in number of cases including the case of Zahira Shaikh (supra), has said that the Court has to adopt actual and analytic role. Endeavour by the Presiding Judge of the Court should be to get at the truth if required by having recourse to sections 311, 391 of CrPC and Sec.165 of Evidence Act,1872 at the appropriate and relevant stages (Emphasis supplied for the purpose). It would not be legal to say that this can be done at the end or conclusion of the entire evidence that may be led before the Court including the evidence, if led, by the defence side. The

say of ld. PP Mr. Oza before this Court is that noticing certain glaring aspects that were taking shape, the State Government decided to substitute the Special PP and immediately after entry/appearance of substituted ld. PP Mr. Gandhi, he took up the cause of the present petitioner. The trial Court ought not to have decided so mechanically and technically the issue that was pressed into service by the complainant and there is no reason even for this Court to believe that the complainant has attempted to steer the prosecution placing the State and ld. PP in back-seat.

25. The Court is not able to accept the arguments advanced by ld. counsel Mr. Bhargav Bhatt appearing on behalf of some of the accused persons that in the cases where discretion entirely lies with the Court are entirely interlocutory procedural orders and private party has no right to agitate a grievance before the revisional court against such order. The ratio of the decision reported in the case of S.K. Mahajan and etc. v/s Municipality,, Jammu and Others etc., 1982 Cri.LJ 646, of Jammu & Kashmir High Court would not help the accused. The argument advanced on behalf of the respondents accused, if is accepted that rejection of application under sec.311 would not create such a infirmity rendering the entire trial defective, also would not help them because while dealing with such an application, the trial Judge has to consider whether calling or recalling of a particular witness or witnesses would help him in finding out the true facts and thus the real truth. If anybody is playing a game of hide and seek, then at lest those parties or the witnesses should not be provided a ground to play such a game. It is settled legal position that misconduct, may be of an inaction of a lawyer or the Investigating Officer, is not binding to a party to whom he or she represents, but the very party can point out that some more exercise need be done by the Court within the frame of the scheme of CrPC whereby the Court can get assistance in finding out the truth. As per the settled legal position, feasible test is whether upholding the objection raised by a party would result in culminating the proceedings or not. If so, any order passed on such objections would not be merely an interlocutory in nature. The fact that the order was passed at an interim stage is not the sole test for deciding whether it is interlocutory or not, but this test, obviously, is held to be a sole test. The trial Court should not create a situation where the superior court, while finding justiciable solution, is left to only option of order of retrial. In view of the observations of the Apex Court in the case of Akalu Ahir

and others v/s Ramdeo Ram, AIR 1973 SC 2145, normally the retrial should not be ordered unless there is some infirmity rendering the trial defective. The reason is that the expression of opinion by the Superior Court on the evidence before it with respect to the commission of the alleged offence though not binding on the Court holding fresh retrial, may never the less leave unconscious impression on the Court holding such trial. So, the moment where it is brought to the notice that certain material defects have been committed and the same are otherwise curable within the formate of CrPC and without violating the principles of natural justice and that too by avoiding prejudice, the appropriate interim orders can be sought for and such orders can not be branded as interlocutory orders within the meaning of the scheme of Sec.397 of CrPC. So, every endeavour should be made to keep the trial on track with an anxiety to see that true facts are brought on record. The Court should not be discouraged on legal technicality because ultimate aim is to secure the ends of justice and not of recording mere conclusion of the trial. So, the fact that the trial Court can still call these witnesses or any of them suo motu is one more possibility, but this would not disentitle the prosecution for praying so. The ratio of the decision of the Apex Court in the case of Jamatraj Kewalji Govani v/s State of Maharashtra, AIR 1968 SC 178, thus would not help the accused whereby it is argued that the stage of exercise of second part of Sec.311 is not reached yet, and as the application to recall the witnesses is at the midst of trial,no interference is called for and, therefore, this Court should not interfere with the finding recorded by the trial Judge. The Court is also not in agreement with the submission that the prosecution has so far not come forward with a clear stand that recalling of the witness is a necessity and it is not necessary for the Court to reach to a conclusion that on contemporaneous material available with the Court including the papers of chargesheet where previous statements of the witnesses recorded by the Investigating Officer under Sec.161 are supplied to arrive at a conclusion that if the witnesses are re-called, they may depose differently.

26. When an application under Sec. 311 is made before the trial Court, it is not necessary to mention each details expressing anxiety and/or need, nor it is necessary to mention the adequate material meticulously for the purpose. All relevant aspects can be placed before the trial Court during the course of oral submissions in support of the application made when the parties are heard in case of resistance by the other side

and if a party is able to place adequate material for the purpose, it would be wrong to conclude that such a party is trying to steer the prosecution. In case of Mir Mohd. Omar & Others v/s State of West Bengal, AIR 1989 SC 1785, the Apex Court while allowing the appeal of the original accused, uphold the finding recorded by the ld. trial Judge whereby he had refused to collect substantial part of evidence of a particular witness as the correction slips were filed much after recording of evidence of witness and it were unsigned. In this decision, the Apex Court has said that there was no justification for the High Court in giving liberty to the prosecution to file an application for re-examination of P.W.34 when it found that the prosecution has closed the evidence and statement of the accused under Sec.313 of CrPC is also recorded. The prosecution had not attempted to move at any earlier stage before the trial Court for recalling P.W.34 for further examination. In such a situation, the Apex Court held that the liberty to the prosecution to recall P.W.34 for re-examination "undoubtedly uncalled for". In the present case, after filing of the application under Sec.311, the State Government steering the prosecution has decided termination of the service of the Spl.PP and before the application came up for hearing, the substituted Spl.PP by special notification has supported the complainant. So, it would be wrong to say that it would not be legal or otherwise proper to say that ratio of the decision in the case of Mir Mohd. Omar (supra) would go against the petitioner. On facts, it is apparent that this is not a case only of lacuna left either by the prosecution or by any of its witnesses. The ratio of the decision in the case of Rajendraprasad v/s Narcotic Cell, AIR 1999 SC 2292 is not found helpful to the accused. On the contrary, one observation made by the Apex Court in para-6 of the cited decision on the contrary helps the present petitioner where the Apex Court has said;-

"....The adage "to err is human" is the recognisation of the possibility of making mistakes to which the humans are proned. A corollary of any such latches or mistake during conducting of a case, can not be understood as lacuna which a Court can not fill up."

" It is settled legal position that the powers under Code qua the cases which involve something arising ex-improviso, which no human ingenuity can foresee, on the part of a defence, our Code does not make this a condition for exercise of the powers and it has no right to embark upon judicial legislation....."

"It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in the Court or to recall a witness already examined and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the Court exercises power under the second part, the inquiry can not be whether the accused has brought anything suddenly or unexpectedly, but whether the Court is right in thinking that the new evidence is needed by it for a just decision of the case."

If the Court has acted without the requirement of a just decision, the action is open to criticism, but if the Court's decision is supportable being in aid to just decision, the action can not be regarded as exceeding jurisdiction. The grievance of the present petitioner before the Court is that the ld. trial Judge has failed in appreciating the element of necessity and the relevance of demand made. So, when failure of the trial Court in exercise of jurisdiction is satisfactorily brought to the notice of the Court, the contentions raised by ld. counsel Mr. Malkan and in turn by ld. PP Mr. Oza shall have to be accepted.

27. One more point that has been advanced by ld. counsel Mr. Bhargav Bhatt is that this Court viz. This very Bench after passing the order dated 1.3.2004, should not proceed further with the matter as the suo motu directions contemplated in the order are very vide, non-specific and beyond the scope of business allocated to the Court as per the current roster and, therefore, this Bench should relegate the hearing to any cognate Bench. Mr. Bhatt has quoted following part of the order dated 1.3.2004 passed by this Bench:-

" This Court is also inclined to issue Notice Suo motu to the respondents to show cause why the reliefs as prayed for in this Rev.Application filed by the original complainant and/or any other appropriate orders which are likely to go to the root of conduction of the trial, should not be granted, returnable on 8.3.2004. Ld. APP Ms. Nandini Joshi appears and waives service of notice for respondent No.1 State."

28. Close reading of the above paragraph of the order

clearly reveals that the Court was inclined to exercise Suo Motu revisional jurisdiction, that has also an element of supervisory jurisdiction and it is true that ultimately if the Court would have decided to exercise any powers vested with this Court under Articles 226 & 227 of Constitution of India and/or under Sec.482 of CrPC, it was possible for the Court to pass appropriate further orders at that relevant point of time requesting the ld. Chief Justice to entrust the hearing to the Bench taking up such matters as per the roster. The order of 1.3.2004 when was passed, this Bench was entrusted to take up admission as well as final hearing of Cri. Rev. Applications, as per roster, is not a matter of dispute. The following words in the order dated 1.3.2004 are material and relevant where it is said "In the meanwhile, ld. APP appearing in the matter before the trial Court on behalf of the State of Gujarat is ordered to be joined as party (in both the revision applications viz. present criminal revision application as well as suo motu revision application ....." (Emphasis supplied).

29. It seems that the arguments advanced by ld. counsel Mr. Bhatt is based on a surmise that the Court had decided to exercise powers vested with the Court under Article 227 of the Constitution of India read with Sec.482 of CrPC. While hammering this point, Mr. Bhatt has quoted some observations of this Court in the case of Ajit D.Padiwal v/s State of Gujarat & Ors., 1998(2) GLR P.1182. However, the facts of the cited case are materially different, where the ld. Single Judge had taken suo motu notice of a news item and issued directions though as per allotment of work as per roster he was not to deal with the matter of Public Interest. It is not a matter of dispute that "Chief Justice is master of roster". Hon'ble the Chief Justice has prerogative to constitute a Bench and to allot the work and no ld. Single Judge can pick and choose any case or any matter for its disposal without appropriate orders by the Hon'ble the Chief Justice. The Court after considering Gujarat High Court Rules, 1993, found that as per the allotment of work, at the relevant time, ld. Single Judge had no jurisdiction to entertain Public Interest Litigation and petition filed in the nature of PIL otherwise was entertainable by the Division Bench. The Court also found that identical matter was being dealt with by the Division Bench of Hon'ble the Chief Justice & Ld. Single Judge and that it was not at all necessary for the ld. Single Judge to initiate another suo motu proceedings. In the present case, when the petitioner -original complainant approached this Court

praying to exercise revisional jurisdiction, the Court found that this is a case wherein this Court suo motu ought to have called for R & P and examined the legality and validity of the order passed by the ld. Addl. Sessions Judge rejecting the application filed under Sec.311 of CrPC to recall certain witnesses. There was nothing wrong for the Court in considering the complexity of law on the similar issue that may emerge and right of the original complainant or victim in criminal case instituted on a police report while exercising the powers to invoke revisional jurisdiction suo motu. A private party in such cases where certain irregularities or illegalities committed by the trial Court, initially decides to withdraw revision application for the reasons best known to such party, unless such contingency crops up, the Court may not invoke revisional jurisdiction suo motu and till then nothing is required to be done, if is the base of submission even indirectly, has no legal stand. On the contrary, the Judge of each Court should act and perform the role in the direction that is able to help him in searching the truth. Right from the inception of the judicial system, it has been accepted that discovery, vindication and establishment of truth are main purposes certainly of the existence of courts of justice. Application of this principle including the principle of fair trial involves delicate judicial balancing of competing interest especially when it comes to a criminal trial. So, the interest of the accused and public interest including the interest of victim,when is found involved, then in all such cases, the Court should eagerly exercise suo motu powers if conferred by the Statute otherwise some hankey pankey that may be played out of Court, may lead to frustration ultimately. It is true that when the Court directed to join ld. PP as party respondent in revision proceedings, it was something then usual and on account of this only, contingencies were placed before the Court and thereafter there was no reason for the Court to exercise any constitutional or extraordinary inherent powers under Sec.482 of CrPC. When the proceedings initiated suo motu by the Court are found to be overlapping and it is possible to construe that basically the powers with the Court contemplate to exercise jurisdiction are of revisional nature, even if there is a reference of Sec.482 of CrPC or scope to exercise such powers itself would not become an embargo or bar in entertaining hearing of such suo motu proceedings. Ratio of the decision, therefore, in the case of Ajit D.Padiwal (supra) or ratio of the decision in the case of Gullapalli Nageshwararao and others v/s State of Andhra Pradesh, AIR 1959 SC 1376, would not help the respondents

accused. Decision in the case of Gullapalli Nageshwararao (supra) is cited to point out "doctrine of bias". It is observed by the Apex Court that "..... (i) no man shall be a judge in his own case and (ii) justice should not only be done but manifestly and undoubtedly seen to be done. The two maxims yield the result that if a member of a judicial body is "subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not to take part in the decision or sit on the tribunal." So, at one point of time, ld. counsel Mr. Bhatt has attempted to submit before the Court that his Bench has decided to exercise "suo motu" revisional powers, then it should be construed that it has pre-judged the issue and there is a scope to assume that the Bench has formed bias. This submission is neither legal nor healthy. Chapter-13 of CrPC dealing with reference or revision provides independent scheme where satisfaction, prima facie, involving the question as to legality and validity is the most important and relevant factor. Unless High Court or Court of Sessions is satisfied, prima facie, there is no scope for any of the Courts having concurrent jurisdiction conferred by the Statute to have any reason to call for or examine record of any proceedings before any inferior criminal court situated within its or his legal jurisdiction. The purpose of invoking such powers normally is to satisfy itself or himself as to the correctness, legality and propriety of any finding, sentence or order recorded or passed and as to the irregularity of any proceedings of such inferior Court. So, if the arguments of ld. counsel Mr. Bhatt are accepted, then a Sessions Judge exercising revisional jurisdiction initiated suo motu by him, as per the scheme of sec.397 R/w sec.399 of CrPC, shall not be competent to hear or decide the proceedings initiated by him. In the areas falling under Sessions Division may not have or may have only one Sessions Judge. In that contingency, whether the powers exercised suo motu by the ld. Sessions Judge shall have to be transferred by magnifying the "doctrine of bias" to other Sessions Division or such proceedings should be kept pending till the date the Presiding Judge who has initiated the proceedings is transferred from that Court, would be again a question. The doctrine of bias is accepted and is a known principle in the field of criminal jurisprudence. Powers of this Court to initiate suo motu revision proceedings as per the scheme of Sec.397 R/w sec.401 of CrPC, can be exercised by the Bench taking up such maters as per roster. Ld. Presiding Judge has observed that one senior police officer who was at the relevant point of time , DSP of

District Amreli, was asked to make some further investigation in the crime. The Court is informed that this decision has been taken by the State Government in compliance with the statement made before the Apex Court and such exercise is undertaken in number of such or similar cases. Even then the Presiding Judge if is found that he has focussed on mere technicality or in a given case after reading depositions of some witnesses in the background of the grievance expressed before the Court by the original complainant, decides to look into the matter, would not attract the element of pre-judging the issue or a doctrine of bias. For short, there is no merits in this point. If any of the accused was of the view that there is clear element of bias of prejudgment on the point, then they could have boldly approached appropriate forum to see that matter is transferred to any other cognate Bench taking up such matters other than Cri. Rev. Applications. Some of the accused persons, it seems, has indirectly tried to put pressure on the Court, but normally a Judge should not succumb to such tactics or tricks. It would be escapism.

30(i) When the ld. Addl. Sessions Judge decided the application exh.156, an application exh.157 preferred by the ld. APP praying further investigation was pending for hearing and that application was also to be decided and it is not a matter of dispute that the State itself had prayed for further investigation in compliance with the statement made before the Apex Court in a litigation pending with Court. This aspect could have been considered while dealing with an application exh.156 as the same being relevant qua the prayer made in an application exh.157.

(ii) This also can be said to be an error committed by the ld. Addl. Sessions Judge.

31. For short, Revision Applications are allowed. Suo motu proceedings initiated by the Court culminate in favour of the petitioner -original complainant as well as the petitioner of cri. Rev. Application No.94/2004 namely Shaikh Madinabibi also succeeds. In the same way, her request to grant an application Exh. 156 as prayed for is allowed and the impugned order passed by ld. Presiding Judge, 4th Fast Track Court, Godhara dated 20.01.2004 is hereby quashed and set aside. The ld. Presiding Judge of the Court dealing with aforesaid both the Sessions Cases, shall see that witnesses named in the application exh. 156 and that may be named by ld. Spl.PP Mr. Gandhi are called back for further examination including cross-examination or only for

cross-examination. Thus, Cri. Rev. Application No.94/2004 is also allowed accordingly. Rule is made absolute accordingly in both the Rev. Applications.

32. It appears that for the reasons best known to the State, they have not preferred any separate Revision Application against the order below application Exh.156. Of course, ld. PP Mr. Oza has tried to explain the contingency and submitted that when the State has taken cause of the petitioner of Cri. Rev. Application No.94/2004, it is not necessary to duplicate the things by preferring another Cri. Rev. Application on behalf of the State. The Court is not inclined to comment upon the explanation given on behalf of the State.

[C.K. BUCH, J]

*rawal

FURTHER ORDER :

It is submitted jointly by ld. counsel appearing for respondents accused that CAV Judgment passed by this Court may be placed under suspension as the some of the accused may decide to approach the higher forum and challenge the judgment pronounced by this Court today. The main submission advanced is that if the trial proceeds, then the petition contemplated before the Apex Court may become infructuous. The second submission is that if the stay is granted, then the prosecution is not likely to suffer any prejudice.

Having considered the facts and circumstances of the case and totality emerging from the record as well as from the submissions made before the Court today and on earlier occasion, the Court is not satisfied and, therefore, the request to suspend the order for 3 (three) weeks is refused. No stay as prayed for is granted.

12.10.2004 [C.K. BUCH, J]

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